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No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Army Corps of Engineers may, consistent with the Clean Water Act and the Commerce Clause, exercise regulatory jurisdiction over a series of permanent and seasonal ponds and small lakes that are used as habitat for numerous species of migratory birds.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (Pet. App. 14a-36a) is reported at 998 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. Justice Stevens granted an extension of time to and including January 14, 2000, for filing a petition for a writ of certiorari, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act (Clean Water Act or CWA) in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the chief goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Conference Report accompanying the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. The Corps' original regulations limited the geographic scope of the Corps' authority to waters that were navigable-in-fact. After that narrow interpretation was rejected

by the courts,[1] the Corps issued interim final regulations in 1975, see 40 Fed. Reg. 31,320, and final regulations in 1977, see 42 Fed. Reg. 37,122. The final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[2] The regulation in its current form contains similar language. See 33 C.F.R. 328.3(a)(3).[3] Regulations promulgated by the Environmental Protection Agency (EPA) include a substantially identical

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[1] See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975); *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). Shortly after the decision in *Holland*, the House Committee on Government Operations expressed the view that the Corps' regulatory definition of "waters of the United States" was unduly narrow. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that the term be given the broadest possible constitutional interpretation." *Id.* at 27.

[2] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

[3] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3).

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded the scope of its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In its discussion of the regulations, the Corps observed that the EPA had "clarified that waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

2. a. Petitioner Solid Waste Agency of Northern Cook County is a consortium of Illinois municipalities formed for the purpose of locating and developing a disposal site for nonhazardous waste. Pet. App. 1a-2a. Petitioner owned a 533-acre parcel of land in Cook and Kane Counties, Illinois, on which it proposed to locate a solid waste landfill. *Ibid.* The project site was 410 acres in size, 298 acres of which was an "early successional stage forest." *Id.* at 2a. Over time, "[w]hat were once gravel pits" have evolved into "over 200 permanent and seasonal ponds * * * rang[ing] from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Ibid.*

Approximately 121 species of birds have been observed on the project site, including species that "depend on aquatic environments for a significant

portion of their life requirements" and "migrate through portions of the United States." C.A. App. 90. "Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp swallows, redwinged blackbirds, tree swallows, and several varieties of herons.' Pet. App. 3a. Each of the above-listed species is on the list of migratory bird species protected under international treaties. See 50 C.F.R. 10.13. "[T]he site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993." Pet. App. 3a.

b. Petitioner's proposed balefill would involve the filling of approximately 17.6 acres of the ponds and small lakes on its property. Pet. App. 3a, 15a. The Corps ultimately concluded that the ponds are "waters of the United States" falling within its regulatory jurisdiction under 33 C.F.R. 328.3(a)(3) because (*inter alia*) "the water areas are used as habitat by migratory birds[s] which cross state lines." C.A. App. 90; see also Pet. App. 3a-4a, 15a-16a. Petitioner subsequently applied to the Corps for a permit under Section 404 of the CWA, 33 U.S.C. 1344. C.A. App. 85-86; Pet. App. 4a, 16a. After an extensive public review process and input from numerous local, state, and federal agencies, the Corps denied the permit in July 1994. C.A. App. 84-171; Pet. App. 4a, 16a. The Corps based the permit denial on the agency's findings that (*inter alia*) (1) the landfill would seriously degrade or eliminate the value of the area as habitat for numerous species of birds and other wildlife (C.A. App. 155-157); (2) petitioner had failed to demonstrate that there were no practicable alternatives to the proposed landfill that would be less environmentally damaging (*id.* at 170); and (3) the

project posed "an unacceptable risk to the public's drinking water supply," due to the possibility that leachate from the landfill could contaminate groundwater aquifers (*id.* at 171).

3. Petitioner filed suit in federal district court, seeking judicial review of the Corps' decision under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 14a. Petitioner challenged both the Corps' assertion of regulatory jurisdiction over its property and the merits of the permit denial. *Id.* at 1a. The district court granted summary judgment for the government on the issue of CWA jurisdiction. *Id.* at 14a-36a. Petitioner then consented to the dismissal with prejudice of its remaining claims, and the district court entered final judgment in favor of the government. *Id.* at 2a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court observed that petitioner had "abandoned its challenge to the merits of the Corps' decisions and ha[d] instead focused exclusively on its challenge to" the Corps' assertion of regulatory jurisdiction over the property based on the presence of migratory birds. *Id.* at 4a. The court therefore "accept[ed] as true the Corps' factual findings with regard to [petitioner's] permit application, including the crucial finding that the waters of this site were a habitat for migratory birds." *Id.* at 5a.

a. The court of appeals rejected petitioner's contention that "Congress lacked the power to grant the Corps regulatory jurisdiction over isolated, intrastate waters based on the presence of migratory birds alone." Pet. App. 5a. Prior to this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the court explained, "it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of

migratory birds." Pet. App. 5a (citing cases). The court found that *Lopez* had not undermined that rule. It observed that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 6a. The court summarized statistical evidence showing that Americans engage in frequent interstate travel and spend substantial sums of money in order to hunt and observe migratory birds. *Id.* at 7a. It concluded that

> the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Ibid. The court also stated that "the numerous international treaties and conventions designed to protect migratory birds, * * * as well as the case law recognizing the 'national interest of very nearly the first magnitude' in protecting such birds," refuted petitioner's contention that the protection of migratory bird habitat is a matter of purely local concern. *Id.* at 8a (quoting *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983)).

b. The court of appeals rejected petitioner's argument that the Corps' exercise of regulatory jurisdiction over the ponds in question exceeded its authority under the CWA. The court observed that the construction of the statutory term "waters of the United States"

utilized by the Corps and EPA is entitled to deference under the principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 9a. The court found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." *Ibid.* (citing cases). It concluded that, "because Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner." *Id.* at 10a.

c. The court of appeals rejected petitioner's contention that the Corps' exercise of regulatory jurisdiction in this case was inconsistent with *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). *Wilson* involved a challenge to 33 C.F.R. 328.3(a)(3), which defines "waters of the United States" to include all waters "the use, degradation or destruction of which could affect interstate or foreign commerce." The court of appeals in the instant case explained that the *Wilson* court "found the regulation to be an unreasonable interpretation of the [CWA] based on its suspicion that Congress lacks the power to regulate waters that 'could' affect interstate or foreign commerce." Pet. App. 10a. The court of appeals stated that in the present case,

> the question whether Congress may regulate waters based on their *potential* to affect interstate commerce is not presented, because the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats.

Ibid.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends that the decision of the court of appeals conflicts with the ruling of the Fourth Circuit in *United States* v. *Wilson*, 133 F.3d 251 (1997). That claim is incorrect.

a. *Wilson* was a criminal case in which the defendants were convicted of knowingly discharging dredged or fill material into waters of the United States without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). See 133 F.3d at 254. With respect to the jurisdictional element of the CWA, the jury was instructed that "[t]he government must prove that these waters have some potential connection with interstate commerce." *Id.* at 256.[4] The district court based that instruction on the regulatory definition of "waters of the United States" contained in 33 C.F.R. 328.3(a)(3), which encompasses "[a]ll other waters such as intrastate * * * wetlands * * * or natural ponds, the use,

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[4] The jury instructions further explained that the wetlands at issue would be considered "waters of the United States" if the jury found "that these waters were *or could be* used by visitors from other states for recreational or other purposes"; "that fish or shellfish are *or could be* taken from these waters and sold in interstate or foreign commerce"; "that these waters were used *or could have been used* for industrial purposes by industries in interstate commerce"; or "that the use, degradation or [destruction] of such waters *could* affect interstate commerce." 133 F.3d at 256 (emphasis added).

degradation or destruction of which could affect interstate or foreign commerce." The defendants argued that "the regulation and jury instructions [we]re fatally flawed * * * because of their invocation of 'potential' uses and effects on commerce." 133 F.3d at 256.

The *Wilson* court reversed the convictions and remanded for a new trial. It stated that 33 C.F.R. 328.3(a)(3) permits the exercise of CWA jurisdiction over waters "solely on the basis that the use, degradation, or destruction of such waters *could* affect interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters." 133 F.3d at 257. The court concluded that the Corps had exceeded its authority under the CWA by defining the term "waters of the United States" in that manner, and that the jury instructions based upon the regulation were therefore erroneous. *Ibid.*[5]

b. Although the decision in *Wilson* is in some tension with the court of appeals' ruling in this case, no square conflict exists. The *Wilson* court held that the Corps had exceeded its authority by asserting jurisdiction over all waters the use, degradation, or destruction of which could potentially affect interstate commerce. The court did not attempt to describe the sorts of connections to interstate commerce that would suffice to bring a particular body of water within the CWA's coverage. See 133 F.3d at 256 ("we need not resolve these difficult questions about the extent and limits of

[5] The *Wilson* court reversed the defendants' convictions on an additional, independent ground, holding that the district court had erroneously instructed the jury on the mental state requirements of the offense. 133 F.3d at 260-265.

congressional power to regulate nonnavigable waters to resolve the issue before us"). The *Wilson* court did not, in particular, address the question "whether the destruction of the natural habitat of migratory birds in the aggregate 'substantially affects' interstate commerce." Pet. App. 7a.[6] Thus, nothing in *Wilson* purports to resolve the question whether use of a

[6] The *Wilson* court stated that 33 C.F.R. 328.3(a)(3) was defective, in part, because it does not require "that the regulated activity have a *substantial* effect on interstate commerce." 133 F.3d at 257. The court did not say, however, that each individual instance of the regulated activity must substantially affect interstate commerce. The Fourth Circuit has since clarified its views on this point in *Brzonkala* v. *Virginia Polytechnic Institute & State University*, 169 F.3d 820 (4th Cir. 1999) (en banc), cert. granted, Nos. 99-5 & 99-29 (argued Jan. 11, 2000). There the court recognized that Congress may regulate "activities that arise out of or are connected with a commercial transaction, which *viewed in the aggregate*, substantially affects interstate commerce." *Id.* at 831 (quoting *United States* v. *Lopez*, 514 U.S. 549, 561 (1995)) (emphasis added). See also 169 F.3d at 831 (acknowledging that federal regulations may "include a jurisdictional element to ensure, 'through case-by-case inquiry,' that each specific application of the regulation involves activity that in fact affects interstate commerce") (quoting *Lopez*, 514 U.S. at 561); 169 F.3d at 836. Cf. *United States* v. *Nathan*, 202 F.3d 230 (4th Cir. 2000) (rejecting argument that government must prove a "substantial effect" on interstate commerce in every prosecution of a felon for possession of a firearm under 18 U.S.C. 922(g) (1994 & Supp. IV 1998)).

The court of appeals in *Brzonkala* went on (incorrectly, in our view) to hold that the aggregate effects principle is generally limited to regulation of activities that are "economic" or "commercial" in nature (169 F.3d at 834-836) or at least have some "meaningful connection with a[] particular, identifiable economic enterprise or transaction" (*id.* at 834). Petitioner's proposal to construct and operate a municipal solid waste landfill, however, is clearly an economic activity. Cf. *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389 (1994).

particular body of water as habitat for migratory birds is sufficient to bring the water within the Corps' jurisdiction under the CWA.[7]

Finally, petitioner argues (Pet. 11) that its ponds cannot be "waters of the United States" under the Fourth Circuit's view of the CWA because they have "no connection to navigable or interstate waters or waters closely related thereto." Petitioner refers (Pet. 10) to the suggestion in *Wilson* that, "[e]ven as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." 133 F.3d at 257. That statement, however, is merely *dictum* and does not constitute an "alternative" holding (Pet. 11).

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[7] Petitioner contends (Pet. 10) that because the so-called "migratory bird rule" is an "*interpretation* or *clarification*" of Section 328.3(a)(3), the *Wilson* court's determination that the regulation is invalid necessarily implies that the "migratory bird rule" is invalid as well. That is a non sequitur. The 1986 *Federal Register* notice (see p. 4, *supra*) identified waters "[w]hich are or would be used as habitat by" migratory birds as an example of waters that would fall within the Corps' conception of "waters of the United States." The *Wilson* court's holding that the regulatory definition sweeps too broadly does not logically suggest that this (or any) particular category of waters falls outside the Corps' statutory jurisdiction. As the court of appeals in the instant case observed, moreover, "the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat." Pet. App. 10a. The question whether the Corps may properly assert "jurisdiction over areas that are only potential habitats" therefore is not presented in this case. *Ibid.*

c. The lower courts that have specifically considered the question have uniformly upheld the Corps' authority to regulate isolated waters that serve as habitat for migratory birds. See *Leslie Salt Co.* v. *United States*, 896 F.2d 354, 360 (9th Cir. 1990) (*Leslie Salt I*) ("The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species"), cert. denied, 498 U.S. 1126 (1991); *Leslie Salt Co.* v. *United States*, 55 F.3d 1388, 1394-1396 (9th Cir.) (*Leslie Salt II*) (adhering to *Leslie Salt I* in a post-*Lopez* decision, under law of the case doctrine), cert. denied, 516 U.S. 955 (1995); see also *Utah* v. *Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (evidence that "lake is on the flyway of several species of migratory waterfowl" supports jurisdiction over isolated lake under CWA and Commerce Clause); *United States* v. *Hallmark Constr. Co.*, 14 F. Supp. 2d 1069, 1075 (N.D. Ill. 1998); *United States* v. *Sargent County Water Resource Dist.*, 876 F. Supp. 1081, 1087 (D.N.D. 1992).

2. The court of appeals' decision is correct.

a. Petitioner contends (Pet. 17) that because Section 404 of the CWA uses the term "navigable waters," 33 U.S.C. 1344(a), the Corps' jurisdiction must be strictly limited to those waters that are "navigable in fact," "interstate," or "closely related to navigable or interstate waters." That argument is without merit. Congress defined the term "navigable waters" broadly to include, without qualification, "the waters of the United States." 33 U.S.C. 1362(7). Because the CWA does not further define the term "waters of the United States," the administrative construction given that term by the Corps and EPA is "entitled to deference if it is reasonable and not in conflict with the expressed intent of

Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

In *Riverside Bayview*, this Court upheld as reasonable the Corps' interpretation of "waters of the United States" to encompass "wetlands adjacent to navigable bodies of water and their tributaries." 474 U.S. at 123.[8] The Court explained that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133; see also *ibid.* ("Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.").

Petitioner's view is not only unsupported by the text, it is also antithetical to the purposes of the statute. The focus of the CWA is not on navigation, but on "maintaining and improving water quality" and "[p]rotect[ing] aquatic ecosystems." *Riverside Bayview*, 474 U.S. at 132; see also *id.* at 133 (noting "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems"); 33 U.S.C. 1251(a) and (a)(2) (goals of the CWA include "restor-[ing] and maintain[ing] the * * * biological integrity of the Nation's waters" and "provid[ing] for the protection and propagation of fish, shellfish, and wildlife"). Isolated waters, such as those on petitioner's property, may "function as integral parts of the aquatic environment," and may "serve significant natural biological

[8] The Court noted that regulatory jurisdiction over nonadjacent wetlands was not at issue in that case. *Riverside Bayview*, 474 U.S. at 124 n.2.

functions," including "food chain production" and the provision of "general habitat[] and nesting, spawning, rearing and resting sites," even though they are intrastate and nonnavigable. *Riverside Bayview*, 474 U.S. at 134-135 (quoting 33 C.F.R. 320.4(b)(2)(i)).[9]

b. Contrary to petitioner's assertions (Pet. 19-22), the Corps' interpretation of the CWA is supported rather than undermined by the Act's legislative history. The Conference Report accompanying the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency

[9] The courts of appeals (including the Fourth Circuit) have uniformly recognized that Congress intended the geographical scope of the CWA to extend to the maximum extent permissible under the Commerce Clause. See, *e.g.*, *United States* v. *Tull*, 769 F.2d 182, 184 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Hartsell*, 127 F.3d 343, 348 & n.1 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998); *United States* v. *Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-915 (5th Cir. 1983); *Leslie Salt I*, 896 F.2d at 357; *Quivira Mining Co.* v. *EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *United States* v. *Eidson*, 108 F.3d 1336, 1341 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997). But cf. *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962, 965-966 (7th Cir.) ("waters of the United States" does not cover groundwater), cert. denied, 513 U.S. 930 (1994). Petitioner cites no case holding that the term "waters of the United States" is limited to waters that are "closely related" to navigable or interstate waters. Petitioner's reliance (Pet. 17) on *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), and *The Montello*, 87 U.S. (20 Wall.) 430 (1874), is misplaced. Those cases, which significantly predate the CWA, construed the term "*navigable* waters of the United States." *The Daniel Ball*, 77 U.S. (10 Wall.) at 562 (emphasis added); *The Montello*, 87 U.S. (20 Wall.) at 436, 439 (emphasis added).

determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). That understanding was confirmed in the Senate Report accompanying the 1977 amendments to the CWA. See S. Rep. No. 370, 95th Cong., 1st Sess. 75 (1977) (noting that "[t]he 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent").

The debates preceding the 1977 amendments to the CWA further support the Corps' interpretation of the Act. Congress was well aware that the Corps' regulations, promulgated July 19, 1977, asserted jurisdiction over all waters, including isolated waters, to the maximum extent constitutionally permissible. See, *e.g.*, 123 Cong. Rec. 26,711 (Sen. Bentsen) (warning that if the CWA were not amended, "[t]he [Section 404] program would still cover all waters of the United States, including small streams, ponds, [and] isolated marshes"); *id.* at 34,852 (Rep. Abdnor) (explaining that the Corps was asserting jurisdiction over "all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes"). Congress considered, but ultimately rejected, several proposals to modify the Corps' geographic jurisdiction, instead opting to exempt certain types of activities from the Section 404 permit requirement. See 33 U.S.C. 1344(f). In the words of Senator Baker, the 1977 amendments "retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the [CWA] to control pollution to the fullest constitutional extent." 123 Cong. Rec. at 39,209. In sum, Congress "acquiesced in the administrative construction." *Riverside Bayview*, 474 U.S. at 136. Congress's refusal to divest the Corps of jurisdiction

over isolated waters is evidence of the reasonableness of the Corps' approach, "particularly where the administrative construction [was] brought to Congress' attention through legislation specifically designed to supplant it." *Id.* at 137; see generally *id.* at 135-137 (recounting history of 1977 amendments).[10]

c. Petitioner contends (Pet. 22) that "no deference" is owed to the migratory bird rule "because it raises serious constitutional concerns" under the Commerce Clause. To the contrary, the application of the migratory bird rule in this case fits comfortably within Congress's commerce power.

i. "Congress' commerce authority includes the power to regulate those [intrastate] activities having a substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-559. The requirement of a "substantial" effect on interstate commerce, however, does not mean that each individual instance of the regulated activity must have a substantial impact. Rather, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 558 (emphasis omitted) (quoting

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[10] Petitioner argues (Pet. 21) that the legislative history of the 1977 CWA amendments is irrelevant because the Corps' 1977 regulations did not specifically cite waters that are used by migratory birds as an example of waters that possess the requisite connection with interstate commerce. The Corps' 1977 regulations referred, however, to "all" "isolated * * * waters that are not part of a tributary system to interstate waters or to navigable waters * * *, the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. at 37,144. Thus, Congress clearly understood that the Corps would assert CWA jurisdiction over isolated waters for which *any* legitimate commerce nexus could be established.

Maryland v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). The aggregate effects of the regulated activity as a class—here, the filling of isolated waters that are actually used as habitat for migratory birds—may therefore be considered in determining whether the statute falls within the reach of Congress's commerce power. 514 U.S. at 561.

The permit denial in the instant case was based in part on the Corps' extensive factual findings (unchallenged by petitioners on appeal, see Pet. App. 5a) regarding the adverse impacts that petitioner's proposed balefill would have on the quantity and quality of migratory bird habitat on the site (C.A. App. 155-157, C.A. Supp. App. 32-40). Those impacts included, *inter alia*, the "displace[ment of] the [Great Blue Heron] rookery in its entirety." C.A. Supp. App. 37. Prevention of such threats has long been recognized to be a matter of national concern. See, *e.g.*, *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920)); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *Cochrane* v. *United States*, 92 F.2d 623, 626-627 (7th Cir. 1937), cert. denied, 303 U.S. 636 (1938); *Cerritos Gun Club* v. *Hall*, 96 F.2d 620 (9th Cir. 1938).

Commerce associated with migratory birds has a measurable impact on the national economy. See *Hoffman Homes, Inc.* v. *United States Environmental Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993) ("Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds."). As the court of appeals observed,

> [s]tatistics produced by the U.S. Census Bureau reveal that approximately 3.1 million Americans spent $1.3 billion to hunt migratory birds in 1996, and that about 11 percent of them traveled across state lines to do so. Another 17.7 million people spent time observing birds in states other than their states of residence; 14.3 million of these took trips specifically for this purpose; and approximately 9.5 million traveled for the purpose of observing shorebirds, such as herons.

Pet. App. 7a (citation omitted). The filling of wetlands and similar aquatic areas that serve as migratory bird habitat directly affects the ability of people to pursue recreational and commercial activities associated with migratory birds. See *Hoffman Homes*, 999 F.2d at 261 (noting that "cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"); see also C.A. Supp. App. 33 (Corps finding in this case that "[m]uch of the current severe drop in area sensitive bird populations is blamed on habitat destruction").[11]

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[11] Congress has repeatedly recognized the importance of preserving migratory bird habitat to the viability of migratory bird populations. See, *e.g.*, North American Wetlands Conservation Act, 16 U.S.C. 4401(a)(8) (finding that nationwide loss of wetlands has "contributed to long-term downward trends in populations of migratory bird species"); Water Bank Act, 16 U.S.C. 1301 (declaring it "in the public interest to preserve, restore, and improve the wetlands of the Nation * * * to preserve and improve habitat for migratory waterfowl"); Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901(a)(2) (finding that "wetlands provide habitat

ii. Petitioner argues (Pet. 26) that the statutory term "waters of the United States" should be construed narrowly under the canon of construction that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court has recognized, however, that Congress may authorize "an administrative board or agency to determine whether the activities sought to be regulated or prohibited have" such an effect on interstate commerce as to justify federal regulation. *United States* v. *Darby*, 312 U.S. 100, 120 (1941). By broadly extending the CWA to "the waters of the United States," Congress expressed its intent that the Corps and EPA would exercise their regulatory jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause. See pp. 2-4, *supra*. Petitioner's interpretive approach—which would limit the Act's coverage to categories of waters having the "'clearest indication' of congressional support" (Pet. 26)—would substantially constrain the agencies' discretion in a manner "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

d. Contrary to petitioner's contention (Pet. 27-28), the Corps' assertion of regulatory jurisdiction over isolated waters that serve as habitat for migratory birds does not disrupt the federal-state balance or impermissibly impinge on the authority of state and local governments. Petitioner's argument assumes that

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essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of * * * migratory birds").

the protection of migratory bird habitat is a matter of purely local concern. As the court of appeals explained, that proposition is inconsistent with "the numerous international treaties and conventions designed to protect migratory birds," Pet. App. 8a (citing examples), as well as with prior decisions of this Court, *ibid.*; see p. 18, *supra*. Congress has repeatedly recognized that wetlands and similar aquatic areas are a *national* resource and that wetlands loss is a problem national in scope. See, *e.g.*, 16 U.S.C. 3901(a) and (b) (declaring national goal to conserve remaining wetland resources for benefit of "all our citizens of the Nation" and to "help fulfill international obligations contained in various migratory bird treaties and conventions").

3. This Court recently granted certiorari in three other cases that present questions concerning the scope of congressional authority under the Commerce Clause. *United States* v. *Morrison*, No. 99-5 (argued Jan. 11, 2000), and *Brzonkala* v. *Morrison*, No. 99-29 (argued Jan. 11, 2000), present the question whether 42 U.S.C. 13981, which creates a private right of action for victims of gender motivated violence, is a permissible exercise of Congress's power under the Commerce Clause. *Jones* v. *United States*, No. 99-5739 (to be argued Mar. 21, 2000), presents the question whether 18 U.S.C. 844(i) (1994 & Supp. IV 1998), which prohibits the destruction by fire or explosives of any building, vehicle, or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," was properly applied to a residence mortgaged to an out-of-state lender, insured by an out-of-state insurer, and supplied with natural gas in interstate commerce. In our view, those statutory schemes are sufficiently different from the CWA that the Court's decisions in those cases are unlikely to affect

the proper disposition of the instant case. However, the Court may wish to hold the petition for a writ of certiorari in the instant case pending its decisions in the above-listed cases, and then dispose of the petition accordingly.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decisions in *United States* v. *Morrison*, No. 99-5 (argued Jan. 11, 2000); *Brzonkala* v. *Morrison*, No. 99-29 (argued Jan. 11, 2000); and *Jones* v. *United States*, No. 99-5739 (to be argued Mar. 21, 2000), and then disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

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